UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Bemis
(Employer),

Case No.: 18-RD-209021

and
Local 727-S of the
Graphic Communication Conference, Teamsters,
(Union),
and

Wayne Devore
(Petitioner).

PETITIONER'S REQUEST FOR REVIEW

INTRODUCTION

Local 727-S of the Graphic Communications Conference of the International Brotherhood of Teamsters (Union) is the exclusive bargaining agent of warehouse employees of Bemis in Centerville, Iowa (Region 18). There is currently no collective bargaining agreement. On October 31, 2017, Petitioner Wayne Devore, on behalf of over 30% of the bargaining unit, filed a Decertification Petition. On or about November 1, 2017 he was notified that an election hearing would be held on November 9. Shortly before that date he received a call from the Region, notifying him that the hearing was postponed because the Union had filed an unfair labor practice charge that would be investigated in two weeks to a month. That charge was subsequently withdrawn but was filed by the filing of the charge was followed by the filing of a host of additional charges by the Union. The total number of charges filed were 9 at the time the Region blocked the election on January 19, 2018. Respondent filed four charges prior to the filing of the

petition and amended two of them after the filing of the petition).[1] To date, almost 3 months after the filing of the Petition, the election still has not been held. On January 19, the Region notified Petitioner that his Decertification Petition was blocked and gave him until February 2, 2018 to file a Request for Review.

The filing of the charges (and amending of subsequent charges) by the Union after the filing of the petition are clearly intended to solely deny the employees their Sections 7 & 9 right to have a fair and prompt. Those charges filed prior to the filing of the petition also unfairly delay the election. Petitioner urges the Board to drastically revise its "blocking charge" policy that delays/prevents decertification elections from occurring. Congress created no explicit authority for the Board to postpone elections due to the filing of unfair labor practice charges. Furthermore, this case contains no allegation that the employees' Decertification Petition was tainted by Employer involvement. Finally, the Region held no hearing to determine the truth or falsity of the Union's allegations, which Petitioner believes are spurious. *See, e.g., Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). Indeed, no neutral designee of this Board ever reviewed the Union's allegations while also taking into consideration the Petitioner's position. The Decertification Petition was summarily blocked without any input from Petitioner or the bargaining unit employees who signed the Decertification Petition.

By his actions, the Regional Director acted outside his authority under the National Labor Relations Act ("Act" or "NLRA"), prevented an election despite the absence of any serious claim that the petition process was tainted, and gave unwarranted credence to the Union's bare and self-serving allegations while diminishing and denying Petitioner and other employees' statutory *rights* to decide their representational preferences for themselves under Sections 7 and 9 of the Act, 29 U.S.C.

[1] Petitioner filed an unfair labor practice charge against the Union alleging that the Union had filed the charges (and amended two of the previous charge) solely to block the election and deny the employees their right to exercise their section 7 & 9 right to an election. The Region dismissed the charge.

§§ 157 and 159.

Pursuant to Board Rules & Regulations Sections 102.67 and 102.71, Petitioner Wayne Devore submits this Request for Review of the Regional Director's decision to block his Decertification Petition. The Board exists to *conduct* elections and thereby vindicate employees' right to choose or reject union representation, not to act outside the authority of the Act and arbitrarily *suspend* election petitions at the unilateral behest of unions who fear an election loss. C.f. *Gen. Shoe Corp.*, 77 NLRB 124, 126 (1948) (holding that the Board should exercise the power to set aside an election "sparingly" in representation cases because it cannot "police the details surrounding every election," and the secrecy in Board elections empowers employees to express their true convictions); see also *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (recognizing that "one of the purposes of the Union in filing the unfair practices charge was to abort Respondent's petition for an election"). This Request for Review should be granted because the Board's "blocking charge" rules unfairly deny employees their fundamental rights under NLRA Sections 7 and 9. The Board's "blocking charge" rules allow unions to delay all *decertification* elections, even as the Board's new Representation Election Rules rush *all certification* petitions to an election with no "blocks" allowed under any circumstances. 79 Fed. Reg. 74308, 74430-60 (Dec. 15, 2014).

The Board should put an end to this double-standard, order this election to proceed at once, and follow the lead of former Chairman Miscimarra, who urged a wholesale revision of the "blocking charge" rules. *See Cablevision Sys. Corp.*, Case 29-RD-138839, (June 30, 2016) (Order Denying Review); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (finding that Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all."); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) (citing the "NLRA's core principle that a majority of employees should be free to accept or reject

union representation.").

In short, this Request for Review, challenging the Board's "blocking charge" rules, raises questions of exceptional national importance. There are compelling reasons for the Board to reconsider blocking charge rules, *i.e.,* vindicating employee free choice. *See* NLRB Rules & Regulations § 102.71(a)(1) & (2), indicating that Requests for Review should be granted when "(1) . . . a substantial question of law or policy is raised . . . [or] (2) [t]here are compelling reasons for reconsideration of an important Board rule or policy." Petitioner asks the Board to: 1) grant his Request for Review; 2) reactivate the election petition; and 3) overrule, nullify, or substantially revise the "blocking charge" rules. Such action by this Board will provide more protection for employees' right to choose or reject unionization at a time of their choosing, and less protection for incumbent unions that "game the system," unilaterally block elections, and cling to power despite their unpopularity.

ARGUMENT

I The Board and its Regional Directors lack explicit statutory authority to block an Election and the Board's rules on "blocking charges" should be abandoned or at a minimum substantially revised.

Employees have a statutory right to petition for a decertification election under the NLRA and that right should not be trampled by arbitrary rules, bars, or "blocking charges" that prevent employee free choice. Employee free choice under Section 7 is the paramount interest of the NLRA. *See Pattern Makers League v. NLRB,* 473 U.S. 95, 104 (1985); *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 532 (1992); *Lee Lumber & Bldg. Material Corp. v. NLRB,* 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act"). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pac., Inc.,* 333 NLRB 717, 725-26 (2001). Industrial stability is enhanced when employees vote in secret-ballot elections, since this ensures that employees actually support the workplace

representative empowered to speak exclusively for them. Yet, the "blocking charge" rules sacrifice this right of employee free choice based on a theory that permits an unpopular incumbent union to cling to power.

There is no statutory basis for blocking charges. Nowhere did Congress explicitly authorize the Board to ignore Section 9(e) of the Act, 29 U.S.C.§ 159 (e), which clearly states that with the filing of a petition by 30% of the bargaining unit employees "the Board shall take a secret ballot of the employees in such unit." The only express limitation on the Board's mandate to conduct and certify such elections is the provision that prevents elections from being held within 12 months of a previous election. The Act contains no other limitations. No matter how offensive the alleged unfair labor practice may be, the election should be held once there is a showing of 30% seeking an election, with challenges or objections, if any, sorted out thereafter.

As noted, the "blocking charge" practice is not governed by statute. Rather, it is a creation of the Board, theoretically based upon the Board's discretion to effectuate the policies of the Act. *Am. Metal Prods. Co.,* 139 NLRB 601, 604-05 (1962); see also NLRB Casehandling Manual (Part Two) Representation Section 11730 et seq. (setting forth the "blocking charge" procedures in detail). But the "blocking charge" rules stop employees from exercising their paramount Section 7 right to choose or reject representation, which is not a proper use of the Board's discretion.

In the absence of blocking charges there are safeguards to election fraud or significant unlawful employer activity. Objections can be made and a post-election hearing held to determine the validity of those objections and whether they impacted employee free choice. The solution to conduct that allegedly interferes with a free and fair election is not to prevent the election from occurring whenever blocking charges are filed. Indeed, that can be a very time-consuming process due to complaint issuance, trial, and appeals. Such delays can drag on for years, violating employees' right

to free choice.

Petitioner does not believe that the allegations in the Union's charges are true; however, even if true many employees still wish to no longer be forced to be represented by the Union. Many employees simply do not like the union they are saddled with, and will vote it out regardless of any progress or lack thereof at the bargaining table. In short, blocking charges are not merely without statutory authorization, but they undermine the Act by limiting employee free choice. The Regional Director's reflexive application of the "blocking charge" policies ignores the fact that Petitioner and his fellow bargaining unit members may wish to be free from union representation, irrespective of any alleged employer infractions. The policies presume that the employees cannot possibly make up their own minds. This is wrong. *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (Member Hurtgen, dissenting); *Cablevision Syst. Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review) (Member Miscimarra, dissenting).

Petitioner and his fellow employees are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. The employees' paramount Section 7 rights are at stake, and those rights should not be so cavalierly discarded simply because their Employer is alleged to have committed a violation or made a technical mistake under the labor laws. Petitioner urges the Board to overrule or overhaul its "blocking charge" policies to protect the true touchstone of the Act—employees' paramount right of free choice under Section 7. *Intl Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961)

In the context of challenges to a certification petition, the Board holds the election first and settles any challenges after. If the Board can rush certification petitions to prompt elections by holding all objections and challenges until afterwards, it can surely do the same for Decertification Petitions. 79 Fed. Reg. at 74430-74460. It is time for the Board to eliminate its discriminatory "blocking charge"

rules, which apply solely to employees who seek to refrain from supporting a union. The Board must create a system for decertification elections whereby such employees are afforded the same rights as employees seeking a certification election to support a union. The solution, if there is any misdeed, is to rely on the Board's objection policies with respect to elections (holding that "there could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation); *see also Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004).

The Board's jurisprudence on blocking elections must be, if not eliminated, then drastically overhauled. The Board has long operated under a system of "presumptions" that prevent employees from exercising their statutory rights under Sections 7 and 9(c)(1)(A)(ii) to hold a decertification election whenever a union files so-called "blocking charges." As discussed above, this is without statutory authority. Furthermore, the Board's practice of delaying and denying elections has faced judicial criticism. *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960) ("[T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented"); *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75 (7th Cir. 1968). Indeed, the Board's policies often deny decertification elections even where the employees are not aware of the alleged employer misconduct, and where their disaffection from the union springs from wholly independent sources. Use of "presumptions" to halt decertification elections serve only to entrench unpopular but incumbent unions, thereby forcing unwanted representatives onto employees. Judge Sentelle's concurrence in *Lee Lumber v. NLRB*, 117 F.3d 1454, 1563-64 (D.C. Cir. 1997). specifically highlights the unfairness of the

Board's policies. 117 F.3d at 1463-64.

Most of these "bars" and "blocking charge" rules stem from discretionary Board policies (see, e.g., Section 11730 of the NLRB Case handling Manual concerning "blocking charges") that should be reevaluated when industrial conditions warrant. *See, e.g., IBM Corp.*, 341 NLRB 1288, 1291 (2004) (holding that the Board has a duty to adapt the Act to "changing patterns of industrial life" and the special function of applying the Act's general provisions to the "complexities of industrial life") (citation omitted)). Here, the Board should take administrative notice of its own statistics, which show that 30% of Decertification Petitions are "blocked," whereas certification elections are never blocked, for any reason. See NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.govisites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf.

Region 18 should be ordered to proceed to an immediate election without delay.

II. Even under current Board law, the Region erred by blocking the election without a hearing in which the Union must first prove there is a causal nexus between the alleged unfair labor practices and employee dissatisfaction.

Using the Board's "blocking charge" rules, the Regional Director prevented the Petitioner and the rest of the bargaining unit from voting to decertify an unpopular and unwanted union, based on the Union's assertions in its unfair labor practice charges. The Regional Director should have held a hearing pursuant to *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) in order for the Union to meet its burden and prove there exists a causal relationship between the alleged unfair labor practices and employee dissent. In order for an unfair labor practice to taint a petition or block an election, there must be a "causal nexus" between an Employer's unfair labor practice and the employees' dissatisfaction with the Union. *Id.* *"[I]t* is not appropriate to speculate, without facts established in a hearing, that there

was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights." *Id.*

Relying on *Master Slack Corp.*, 271 NLRB 78 (1984), the Region should be required to hold a hearing and promptly determine if a causal relationship exists by analyzing a number of factors, including: "[1] the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; [2] any possible tendency to cause employee disaffection from the union; and [3] the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union." *Id.* at 84.

Here, the Regional Director made a unilateral decision to block the election based on unproven unfair labor practice allegations. This case should be used to reestablish, at the very least, the need to hold *Saint-Gobain* hearings. Petitioner believes that, even should the charges be true, they do not impact employee free choice, and there is no nexus between the conduct alleged and employee dissatisfaction with the Union. To so speculate is to deny employees their fundamental Section 7 rights." 342 NLRB at 434. At a hearing, the incumbent union will be required to bear the burden of proof concerning the existence of a "causal nexus." *See, e.g., Roosevelt Mem. Park, Inc.*, 187 NLRB 517, 517-18 (1970) (holding party asserting the existence of a bar bears the burden of proof); *Saint-Gobain Abrasives, Inc.*, 342 NLRB at 434. The Union will not be able to prove any nexus.

CONCLUSION

The Board should grant the Request for Review and order the Regional Director to promptly process this Decertification Petition. It should also overrule or substantially overhaul its "blocking charge" rules which are used and abused to arbitrarily deny Decertification Petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, a true and correct copy of the foregoing Request for Review was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties via e-mail, as noted:

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